proximately 60 minutes immediately following the officers' arrival, one of the agents answered some forty incoming calls on the two bedroom telephones. In nearly every instance the caller asked for "Joe" and proceeded to place a bet or bets, naming a horse, a race, and an amount of money (R. 35-36, 44-45). There was also proof that on numerous occasions between January 31 and February 10, 1963, between the hours of 11 a.m. and 1:45 p.m., a person named "Skippy" was approached by different individuals as he sat in a local restaurant. On each occasion the individual mentioned the name or number of a horse and handed "Skippy" money. "Skippy", after appearing to record the data on a pad, would periodically call the number of one of the two telephones in the rear bedroom of the raided premises, say to the person answering, "Joe, this is Skippy," and read what he had written on his pad (R. 50, 128-129).

The evidence further established that petitioner was called "Joe" and that he was the only person found on the premises by the officers who was so called. Michael Elardo—the only person on the premises at the time of the raid in addition to petitioner and Mrs. Cella—was a resident of Brooklyn, New York, and a brother of Mrs. Cella (R. 94). He had been visiting his sister, who owned and lived in the house, since February 4, 1963 (R. 28, 67, 96). He testified that he had heard his sister and one of his sister's sons (who also lived in the house) call petitioner "Joe" and that no other person known as "Joe" had been in the house, to his knowledge, during the eight days he had been there (R. 98, 100-101, 106,

109-110). Further proof that petitioner was known as "Joe" was testimony by the agent who interviewed him that, when he called petitioner by that name, petitioner, though he was seated some distance from the agent and with his back to him, stood up and turned to face the officer, who thereupon proceeded to conduct the interview (R. 147-148).

Elardo further testified that petitioner, who was shown to have had a key to the house on his personal key ring at the time of the execution of the search warrant (R. 148), had been on the premises on five or six days of the eight-day period during which the witness had been visiting (R. 96-97). Petitioner would arrive at about 11 or 11:30 a.m. and leave—on the days when Elardo was present and observed his departure—at about 4:30 or 5:30 p.m. (R. 101-102, 104). On two mornings Elardo invited petitioner to have coffee with him when he arrived. Thereafter petitioner "disappeared into the back part of the house" (R. 98-99, 111), which had no rear entrance (R. 33). Elardo "presume[d]" that petitioner went into the rear bedroom (the room with the telephones in it) on these occasions, though he "never followed him" (R. 99). The witness noticed that, after petitioner had thus disappeared, the telephones in that room, which was always kept closed, would commence periodically to ring (R. 99-100, 111-112).

2. Mrs. Cella, the owner of the premises at which the wagering paraphernalia was discovered and the person who admitted the officers, was called to testify on the opening day of the two-day trial (R. 13, 66). A week previously she had discussed the facts of the

case with the prosecutor and an Internal Revenue agent at an interview in her home, at which time the prosecutor "went through" a series of questions with her, "one by one by one" (R. 85-89). Though it appears that she answered the questions (or some of them) reluctantly, pleading that she was not feeling well, she in no instance refused to answer a question on the ground that to do so might incriminate her (R. 87-89). On the basis of information given him at the interview, the prosecutor expected to prove through her testimony (among other things) that petitioner had paid her $25 a week for the rental of the room in which the bookmaking enterprise was conducted (R. 41, 69, 89).

At the trial, the witness proceeded to answer some fifteen questions put to her by government counsel without invoking her testimonial privilege (R. 66-68). She acknowledged, among other things, that she owned the premises in question (jointly with one of her two sons) (R. 67), that she had resided there, with her sons, during the period from January 15 to February 12, 1963 (the period during which the illegal bookmaking was alleged by the information to have taken place) (R. 1, 67-68), and that she knew petitioner (R. 68). When asked if she knew whether petitioner "ha[d] a nickname," she declined to answer, for the first time, claiming her "Fifth Amendment" privilege (R. 68).

At this point, at the suggestion of government counsel, the jury was excused (R. 69), and a colloquy ensued in which the prosecutor took the position that the witness should be required to make some showing,

before she could validly claim the privilege invoked, that fear of self-incrimination was the true reason for her refusal to answer (R. 69, 72). The court inquired of the witness what "reasonable apprehension" or "ground of fear" she had in declining to answer the pending question (R. 73-74). After first reiterating that she did not "want to incriminate" herself, the witness finally told the court that she did not know petitioner's nickname (R. 74). The court observed that in that event the pending issue was "moot" (R. 75).

Still in the jury's absence, the court then asked government counsel to make a "proffer" of what additional questions (of the sort which might require the jury to "retire again") he proposed to ask the witness—in order to avoid requiring the jury to go "back and forth" (R. 75-76). Counsel, accordingly, proceeded to ask the witness a series of questions, as to most (but not all) of which she "t[ook] the Fifth Amendment" (R. 76-90).[1] The court, indi-

[1] The witness claimed her privilege as to all questions relating to petitioner and his relationship to the house—*e.g.*, how often he came to the house (R. 76-77), for how long a period he had been coming, whether he was present on February 12, 1963 (the day of the raid), whether the witness had given him a key to the house (R. 77), whether he had ever lived there (R. 78), whether he ever went into the back bedroom (R. 80), whether she had ever seen him answer the telephones in that room, whether she had ever heard the telephones ringing when he was in there (R. 83), etc. With respect to the question whether she knew there were two telephones in the back bedroom, the witness' position was inconsistent. At one point she claimed her privilege as to this question (R. 80-81); at another, she answered it in the affirm-

cating that it would defer decision, for the time being, as to the validity of the witness' claims of privilege, and possibly appoint counsel to advise her on the matter (she had indicated that she had no attorney), asked the prosecutor if he could proceed with another witness in the meantime (R. 90-92). The prosecutor replied that he could, and further informed the court that the testimony of the next witness might make it unnecessary for the government to recall Mrs. Cella (R. 93). Accordingly, the witness Elardo was called and his testimony taken and concluded (R. 93-113). The court then inquired whether the government thought it would be necessary to recall Mrs. Cella (R. 113-114). The prosecutor said he wished to "sleep on" the matter (it was then close to the time for adjournment), explaining that it "require[d] some analysis" (R. 114). The court, accordingly, indicating that it would reserve decision as to the propriety of the witness' claim of privilege until after the government had decided whether it had further need of her evidence, adjourned the proceedings till the following day (R. 114-115).

On the following morning the prosecutor advised the court that he desired to recall Mrs. Cella (R. 115). He noted that there were "some questions that she has indicated she will answer," but that if she "persists in taking the Fifth Amendment on all

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ative (R. 84). She also answered other questions pertaining to the bedroom telephones. She acknowledged, for example, that she had had them installed herself, and she explained the circumstances (R. 84-85).

questions, then it is our position that we will have to proceed with the case without her" (R. 115-116). The court directed that the witness be recalled, observing that, though he was "prepared to rule" (on the question of the propriety of the witness' claim of privilege), he was "not going to rule unless the issue arises" (R. 116).

Mrs. Cella, accordingly, resumed the stand. She repeated in substance, and to some extent elaborated upon, the replies she had given to some of the questions asked of her, out of the presence of the jury, in the previous day's proceedings (R. 117-119; see R. 84-85, and note 1, *supra*, pp. 7-8). In addition, unlike the previous day, on which she had declined to answer all questions pertaining to petitioner and his comings and goings in relation to her house (see note 1, *supra*), on this occasion she testified on these subjects (R. 119-122). Specific questions as to which she had claimed her privilege on the day before were answered by her on this occasion (R. 119-122; see R. 76-78).[2] When asked, however, whether she had ever given petitioner a key to her house, whether he lived in her house, and whether he ever went into the back bedroom, she again invoked her Fifth Amendment privilege—as she had, to those questions, on the preceding day (R. 122; see note 1, *supra*). At this point counsel for petitioner moved for a mistrial (R.

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[2] These included, for example, whether petitioner was known to her as "Joe" (cf. R. 122 with R. 76), how frequently petitioner came to her house (cf. R. 120 with R. 76-77), whether he was there on February 12, 1963 (cf. R. 119 with R. 77), and what time he usually left (cf. R. 121 with R. 78).

123). The motion was denied, the court observing that "although from the statements made yesterday it was reasonable to assume that the Fifth Amendment would be invoked, it was not reasonable to assume what the ruling of this Court would be, because I had not indicated any such ruling" (R. 124). The court thereupon ruled, for the first time, that the privilege had been validly invoked (R. 124), and the witness was excused (R. 127).

ARGUMENT

The court's refusal to declare a mistrial was, we submit, correct. Reversible error is not invariably committed, as this Court observed in *Namet* v. *United States*, 373 U.S. 179, 186, whenever a prosecution witness, in situations like that at bar, "claims his privilege not to answer." It is only where "prosecutorial misconduct"—the "conscious and flagrant attempt [by the government] to build its case out of inferences arising from the use of the testimonial privilege"—is evident, or where (even in the absence of such misconduct) "inferences from a witness' refusal to answer" appear to have added "critical weight to the prosecution's case in a form not subject to cross-examination," that a resulting conviction will not be allowed to stand. *Id.*, at 186, 187. Neither factor was present here.

This was not a case in which government counsel consciously or flagrantly, or indeed at all, sought to build his case out of inferences arising from the use by witness Cella of her testimonial privilege. This

witness, who obviously possessed important knowledge of the relevant facts, had given no indication prior to trial that she would rely on her privilege. When, on the opening day of the trial, she invoked her privilege (in the presence of the jury) in response to a specific question, the jury was promptly excused at the suggestion of the prosecutor. An inquiry ensued, at the prosecutor's request, to determine whether fear of self-incrimination was the true motive for her plea, or whether her true objective was to shield petitioner, who obviously had had some intimate social or business relationship with the witness. When it became apparent, in the course of this inquiry, that the witness' claim of privilege had been made mistakenly (or otherwise without justification), the court was warranted in scrutinizing with some skepticism her subsequent claims of privilege (made in the proceedings out of the presence of the jury) and in deciding to reserve judgment on the issue at the close of the first day's proceedings.

Nor was the prosecutor guilty of misconduct in requesting that the witness be recalled to testify on the second day of the trial. Since it was evident from the first day's proceedings (both those in the presence and those in the absence of the jury) that the witness was willing to answer some questions and was not indiscriminately asserting privilege as to all, he could properly hope that something of value to his case might still be elicited. When thus recalled, the witness, as counsel had hoped, answered not only the questions which she had evidenced her willingness to answer in the previous day's proceedings (out of

the presence of the jury) but other questions as well, including some as to which she had claimed her privilege on the previous day. When she finally did invoke her testimonial privilege, under the circumstances we have related, the court promptly honored her claim and excused the witness.

Particularly since everything that the prosecutor did was done with the full knowledge of and by leave of the court (which was as familiar with the general situation as was the prosecutor), there is no basis, we submit, for a claim of misconduct on the prosecutor's part.

Neither is this a case in which inferences from the witness' refusal to answer added "critical weight to the prosecution's case in a form not subject to cross-examination." That an illegal bookmaking business had been conducted from the back bedroom of Mrs. Cella's residence was not substantially in dispute at the trial (see, *e.g.*, R. 200-204). The only real dispute was as to the identity of the person, called "Joe", who ran the business. Any inferences which the jury may possibly have drawn from Mrs. Cella's claims of privilege added no substantial weight to the strong evidence, from other sources, of petitioner's guilt.[3] Indeed, petitioner's trial counsel

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[3] It is to be doubted, moreover, that any inference which the jury may possibly have drawn from the witness' claim of privilege at her *second* appearance on the witness stand added significantly to the inference which, by hypothesis, the jury must also have drawn from her *first* claim of privilege (at the time of her initial appearance)—which the petition does not complain of, and as to which there was manifestly no impropriety.

argued to the jury that the witness' claim of privilege tended to indicate that she, not petitioner, was the "Joe" ("Jo") who operated the illicit enterprise in the bedroom of her home (R. 200). Cf. *Namet* v. *United States*, *supra*, 373 U.S. at 190.[4]

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1965.

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[4] Petitioner's only other contentions—which he adopts by reference to his brief in the court of appeals (Pet. 5; Pet. App. 27-32)—challenge the sufficiency of the proof of his guilt. We submit, however, that the government's evidence, which we have summarized in the Statement, amply supports the verdict.

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